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JAMES D. MAHE
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 558.

WEED'S INC. and GURDON H. SMITH,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

In Error to the United States District Court for the Northern District of New York.

Brief and Argument for Plaintiffs-in-Error.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1920.
No. 558.

WEED'S INC. and GURDON H. SMITH,
Plaintiffs-in-error,

against

UNITED STATES OF AMERICA,
Defendant-in-error.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF AND ARGUMENT FOR PLAINTIFFS-IN-ERROR.

Statement of the Case.

This is a writ of error to review a judgment of the District Court of the United States for the Northern District of New York, convicting the plaintiffs-in-error, upon indictment, of a violation of the Act of October 22, 1919, c. 80 (41 Stat. 297), amending Section 4 of the Act of August 10, 1917, c. 53 (40 Stat. 276), commonly called the Lever Act.

The Statute.

Sections one and four of the original Act of August 10, 1917, were as follows:

> "That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act.
>
> * * * * * *
>
> "Sec. 4. That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section six of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to en-

gage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof, or (e) to exact excessive prices for any necessaries; or to aid or abet the doing of any act made unlawful by this section."

The Act of October 22, 1919, amended section one of the original Act by inserting the words "wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers," so that section one of the Act was amended to read as follows (the amendment being italicized):

"That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, *wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers;* fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation, and priv-

ate controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act."

The original section four did not provide a penalty for its violation. The amendment of October 22, 1919 (41 Stat. 297), provided a penalty and amended section four so as to make it inapplicable to certain favored classes. The amended section four is as follows (the amendment being italicized):

"That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent,

limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. *Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: Provided, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: Provided further, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them.*"

The Indictment.

The defendants were Weed's, Inc. (a corporation which was organized on January 1, 1920, and has since conducted a leading retail clothing or furnishing store in the City of Binghamton, New York), Charles A. Weed and Gurdon H. Smith, respectively the President, and the Treasurer and Manager, of the corporation. Mr. Weed was not tried (Transcript, pp. 10, 25). The other defendants were tried and convicted (*id.* pp. 10-11, 127).

The indictment contained eight counts. Count Six was dismissed by the District Court (*id.* p. 123).

The first count of the Indictment was for conspiracy "to exact and to aid and abet in exacting

excessive prices for certain necessaries, to wit, wearing apparel." It was alleged that on or about November 1, 1919, (which was before the corporation was organized), the defendant entered into the conspiracy and that between November 1, 1919, and April 1, 1920, and in furtherance of said conspiracy, the defendants caused to be placed upon sale in their store in Binghamton articles of clothing "at prices and figures greatly in advance of the actual cost price thereof." Then followed an enumeration of classes of clothing with the cost and prices as "marked for sale" (*id.* pp. 3-4).

The remaining counts of the indictment, counts Two to Eight inclusive (that is, except the dismissed count Six), charged that prior to January 8, 1920, the defendants "purchased and caused to be purchased certain necessaries," to wit, certain clothing described, and that thereafter (on various dates set forth which fell between January 8, 1920, and March 3, 1920) at their store in Binghamton the defendants unlawfully and wilfully did "cause to be made and aid and abet in making an unjust and unreasonable rate and charge in handling and dealing in and with certain necessaries," to wit, the described clothing. Then followed, in each count, a statement of the price at which the respective sales were made, the difference between said stated price and the alleged cost, and it was alleged that thereby the defendants made an "unjust and unreasonable rate and charge" in "handling and dealing in and with" said clothing (*id.* pp. 4-10). In fact, the evidence was undisputed that most of the articles in question had been purchased long prior to October, 1919.

The first count of the indictment thus rested upon the provision of Section 4 of the Lever Act as amended, providing

> "that it is hereby made unlawful for any person * * * to conspire, combine, agree or arrange with any other person * * * (e) to exact excessive prices for any necessaries."

The other counts rest upon the provision of Section 4 of the Lever Act as amended, making it unlawful

> "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

See charge of District Court (*id.* pp. 120-124).

Demurrer to Indictment.

The defendants demurred to the indictment, and to each count, challenging the constitutional validity of these provisions of the Lever Act and the sufficiency of the indictment.

Among other grounds of demurrer it was set forth that if the acts alleged were contrary to the statute or to any executive regulation thereunder then the statute and such regulation were in violation of the provision of Article V of the Amendments to the Constitution of the United States, in that they deprived the defendants of their liberty and property without due process of law; also, that the statute upon which the counts were based was null and void because not authorized by the Constitution at the times mentioned in the indictment by reason of any state of war; also, that the statute on which the counts of the indictment were based was null and void because it was so uncer-

tain and indefinite in its terms that it did not properly define a criminal offense and was in violation of the provisions of Articles V and VI of the Amendments to the Constitution of the United States.

The Court overruled the demurrer with respect to the entire indictment and with respect to each count thereof and the plaintiffs-in-error duly excepted (*id.* pp. 12-23, 24).

Motion to Dismiss or Quash.

The defendants also raised their constitutional points, and their objections to the sufficiency of the indictment by motions to quash or to dismiss the indictment, in its entirety, and each count, and these motions were overruled by the District Court (*id.* pp. 24-25, 32).

The constitutional questions, as well as the questions relating to the sufficiency of the indictment, were also raised by motions to dismiss at the close of the case and by motion in arrest of judgment (*id.* pp. 94-98, 127).

The District Court denied all these motions and exceptions were duly taken.

Objections to Evidence.

There were serious errors, as the plaintiffs-in-error contend, in rulings upon question of evidence.

The Court in these rulings not only construed the statute, but construed it in a manner which, it is submitted, made the statute as thus applied clearly unconstitutional.

Thus the Court refused to permit evidence by witnesses, concededly competent, of the fair

market value of the articles of clothing in question, both at the time when the statute was passed (October 22, 1919), so far as it affected such articles, and at the times respectively when these articles were marked for sale and actually sold.

The theory of the District Court, upon which, over the objections of the plaintiffs-in-error, the case was tried and submitted to the jury, was that a jury could take the purchase price at which the articles of clothing had been purchased by the plaintiffs-in-error and the price at which these particular articles were sold by the plaintiffs-in-error, and without any proof that the sale prices were above the market value at the time of sale, and without proof that the profits either from the entire business of the store or from the business of any department of the store exceeded a fair return upon the investment in the business at the store, the plaintiffs-in-error could be convicted of a violation of the Act if the jury thought that the price at which the articles were sold respectively, as compared with their cost, gave as to these particular articles an excessive profit.

It appeared from the evidence that a number of the articles described in the indictment had been bought a year, or two years, or more, prior to the enactment of the amended statute, and no regard whatever was paid by the District Court either to the general rise in prices subsequent to the purchase of these articles, or to the increase in the market values of the articles themselves, or to the cost of the replacement of these articles or to the depreciation in money which had occurred in correspondence to the general rise in prices. The District Court not only adhered to its theory in its rulings upon evidence but in its instructions to the jury (*id.* pp. 122-124).

Verdict and Sentence.

The jury returned a verdict against Weed's, Inc., the corporation, and Gurdon H. Smith, and the Court then sentenced these defendants to pay a fine of $1,000 on the First count and of $5,000 on each of the Second, Third, Fourth, Fifth, Seventh and Eighth counts, making a total fine of $31,000 (*id.* p. 127).

From the judgment of conviction a writ of error has been sued out.

Specifications of Error (id. pp. 145-160).

Error has been assigned by reason of

(1) The overruling of the demurrer;

(2) The denial of the motion to quash or dismiss the indictment;

(3) The denial of the motion to dismiss which was made at the close of the case;

(4) The refusal to permit competent proof of the market value of the goods in question;

(5) Other errors in rulings upon questions of evidence;

(6) The erroneous theory upon which the case was submitted to the jury.

There were several rulings of the Court with respect to the question of market value. It is sufficient to refer to the following extracts from the assignment of errors (Transcript, pp. 149, 149-150, 151, 152-153).

> "Counsel for the defendants then stated, 'I offer to show by this witness the market value on October 22, 1919, of the articles of merchandise mentioned and described in subdivisions 22, 25 and 26 of Count One, and in

Counts Three, Four and Eight of the indictment.' The District Attorney thereupon objected to such evidence, and the Court said: 'The market value of the particular item of articles, wearing apparel, on October 22, 1919, I will rule that this witness is competent to testify. I shall rule that it is not competent testimony relative to the issue. Objection sustained.'

"Thereupon, defendants duly took exception to such ruling of the Court. Defendants' counsel then stated: 'I offer to prove by this witness the same facts with reference to the various dates on which those items mentioned in the subdivisions and Counts before mentioned appear to have been sold, by the indictment.' Whereupon, the Court said, 'The same ruling,' to which the defendants duly excepted.

"Counsel for the defendant then offered evidence of the same facts as to the remaining Counts of the indictment, which evidence was likewise excluded by the Court and to which exception was duly taken." (See Bill of Exceptions, *id.*, p. 61.)

* * * * * * *

"Counsel for the defendants then stated to the Court that the position of the defendants was, and the evidence was offered on the theory, that inasmuch as the articles involved and for the sale of which the defendants had been indicted were purchased long before October 22, 1919, when the amendment to the Lever Act took effect, Congress was without power to deprive the defendants of the right to sell such articles at a fair and reasonable advance over the market value of such articles on October 22, 1919; that defendants were not limited to proof of the cost of the goods to them two or three years before the amendment to the Act took effect, but were entitled to show the market value of such articles on October 22, 1919, when the amendment of the Act took effect; and that other-

wise the defendants would be deprived of their property and liberty to contract without due process of law. The court thereupon excluded such testimony, to which the defendants duly excepted.

"Thereupon, counsel for defendants stated to the Court,

> " 'One step further. It brings up the question in another form. I offer to show by this witness, if your Honor please, the value, the market value of this same lot of goods in March, 1920, that is, the date when they' (the Government inspectors) 'visited the store. That is on the same theory and raises another question. That I want to raise now by this offer, and that is, what the market value was of this merchandise at the time if (the merchandise) was marked and put on sale. It is offered on the same ground.'

"To which the District Attorney objected, which objection was sustained, and to which the defendants duly excepted. Thereupon, defendants' counsel stated to the Court:

> " 'Let me also call your Honor's attention to the fact, and I put it on the ground, that a fair construction of the Act itself does not show any intent or purpose on the part of Congress to legislate with reference to existing values or prices or charges. In other words, there is nothing there indicating that they intended that this amendment should operate or this statute should operate in the nature of an *ex post facto* law.'

"To which the Court replied, 'Congress intended to make an infraction of the statute which it passed, the conduct of the seller, the price he charged subsequent to the passage of, the effective date of the law.' To which counsel for the defendants replied, 'Your

Honor will note an exception' (See Bill of Exceptions, *id.*, pp. 45-46).

* * * * * * *

"Defendants' counsel then stated, 'I think it is covered, but I want the last witness * * * I offer to show by Mr. Munves the replacement value to Weeds on October 22, 1919, of this particular lot.' The Court replied, 'You did that by attempting to show the then market value.' In answer to this, defendants' counsel said, 'On those two dates, on October 22, 1919, and in March, 1920,' to which the court replied, 'Yes.'

"Defendants' counsel then made the following offer: 'I offer to show by Mr. Munves that Weeds, Inc., the defendants, on October 22, 1919, would have had to pay the prices at which those goods were marked and sold at that time; in October 22, 1919, if they had bought them in the market they would have had to pay that price.' To this the District Attorney objected, and the court said: 'I will exclude that,' to which defendants duly excepted. Whereupon, the defendants' counsel made the same offer as to March, 1920, to which offer the court made the same ruling and to which exception was duly taken by defendants.

"Again, defendants offered to prove by legal, competent evidence the market value and replacement cost to the defendants on February 11, 1920, the date when some of the items covered by the first count of the indictment were given their 'marked for sale price', which was objected to by the District Attorney 'as immaterial,' which objection was sustained by the court and to which the defendants duly excepted (See Bill of Exceptions, *id.* pp. 48, 63).

* * * * * * *

"By Mr. Hinman:

"Question. What was the market value—wholesale value—of that suit and the suits in that lot on November 20, 1919, when you gave

the marked selling price at $60; that is, what would it have cost you to replace that suit on that day?

"Objected to. Objection sustained. Exception.'

"Thereupon, defendants' counsel made the following offer: 'I offer to show by the witness that the market, the replacement value of the men's suits covered by the 24th item of the first Count of the indictment on December 11, 1919, at the time when Mr. Smith caused the selling price to be marked $75—to be placed on the lot, was $50.' Objection was made and sustained, to which exception was taken. Thereupon, defendants' counsel also offered to prove that the wholesale market value and replacement value of the lot of overcoats described in the 25th item of the first count of the indictment on August 6, 1919—the time when Mr. Smith caused the marked selling price of $50 to be placed on that lot, was $40,—to which objection was made, sustained, and exception to such ruling duly taken. Thereupon, the following occurred:

"Mr. Hinman.—I offer to prove—no question is raised as to his competency?

"Mr. Cregg.—Why don't you simply say you make that same offer as to each count?

"Mr. Hinman.—It is different values.

"The Court.—You have made it as to one. I think that is sufficient, anyway.

"Mr. Hinman.—I think that is so. Now, if your Honor please, let me make the same offer with reference to Counts Two, and I do make the same offer with reference to Counts Two, Three, Four, Five, Seven, and Eight of the indictment where actual sales were made. Same objection. Objection sustained. Exception.

"Mr. Hinman.—Now, if your Honor please, I offer to show that the replacement or wholesale market value of the suits or articles de-

scribed in and covered by Counts Two, Three, Four, Five, Seven and Eight of the indictment, on the dates when those respective articles were sold, as stated in those Counts, was greatly in excess of the cost price—actual cost of those articles, respectively, as stated in those Counts. Same objection. Objection sustained. Exception" (*id.*, pp. 87-88).

ARGUMENT.

The fundamental questions relating to the constitutional validity of the statute and its construction have been so fully presented in the brief for the appellees in the case of *Harry B. Tedrow, as United States District Attorney, appellant,* v. *The A. T. Lewis & Son Drygoods Company, et al.*, on appeal from the District Court of the United States for the District of Colorado (No. 357 of this Term), that it is unnecessary to review again in this case the entire field of the argument. Rather it will be our purpose to present as succinctly as possible and without unnecessary repetition of detail the fundamental considerations involved.

We present the following points:

(1) The Court has jurisdiction of this writ of error.

(2) The statute at the time of its enactment and enforcement, was not a valid exercise of the war power. It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times when the sales in question were effected, to regulate prices of retail sales of wearing apparel in wholly intrastate transactions.

(3) It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times mentioned in the indictment, to deprive plaintiffs in error of the then fair market value of their property by denying them the right to contract for the sale of such property at its fair market value. If the statute in question be construed as the District Court construed it, it is invalid as a deprivation of property without due process of law in contravention of the Fifth Amendment.

(4) The Court below construed the statute erroneously.

(5) The statute, as construed by the Court below, does not validly define a criminal offense and by reason of its uncertainty is invalid under the Fifth and Sixth Amendments.

(6) The statute in question is arbitrary class legislation in violation of the Federal Constitution.

(7) The Court below erred in its rulings upon questions of evidence.

(8) The Court below erred in its submission of the case to the jury.

POINTS.

FIRST.—The Court has jurisdiction of this writ of error.

The constitutional validity of the provisions of the statute, upon which the indictment rests, is involved, and hence it is a case for direct writ of error (Judicial Code, Sec. 238).

The fact that the construction of the statute is involved, as well as its constitutional validity, does not affect the jurisdiction.

Towne v. *Eisner*, 245 U. S. 418;
Billings v. *United States*, 232 U. S. 261, 276;
Altman & Co. v. *United States*, 224 U. S. 583, 596, 597.

SECOND.—The statute at the time of its enactment and enforcement, was not a valid exercise of the war power. It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times when the sales in question were effected, to regulate the prices of retail sales of wearing apparel in wholly intrastate transactions.

Interstate commerce is not involved. The transactions in question were the ordinary retail sales of a dry-goods merchant to purchasers within his own town. Still, the Act of Congress has been applied and the plaintiffs in error have been convicted and fined.

In its brief in *United States* v. *L. Cohen Grocery Company* (No. 324 of this Term, Gov't. Brief, p. 12), the Government says:

> "It is readily conceded that ordinarily legislation of this kind is not within the power of Congress to enact."

The question then is, whether this legislation, regulating intrastate retail prices of wearing apparel, can be sustained as a valid exercise of the constitutional power of Congress to provide for the conduct of a war.

Preliminarily, we assume that the following propositions are beyond controversy:

(1) The war power is found in the express authority

> "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water. * * *" (Article I. Sec. 8. subd. 11.)
>
> "To raise and support Armies * * *" (*id.*, subd. 12).
>
> "To provide and maintain a Navy" (*id.*, subd. 13).
>
> "To make Rules for the Government and Regulation of the land and naval Forces" (*id.*, subd. 14).
>
> "To provide for calling forth the Militia to execute the Laws of the Union, to suppress Insurrections and repel Invasions" (*id.*, subd. 15).

The power to enact the legislation in question, if it exists, must fall within the implied power conferred by Article I, Sec. 8, subd. 18,

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Govern-

ment of the United States, or in any Department or Officer thereof".

(2) The power implied in the authority to provide for the conduct of war is a broad power of vast importance to the security of the Nation, *but it is not an unlimited power.*

Ex parte Milligan, 4 Wall. 2;
Hamilton v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156;
Ruppert v. *Caffey*, 251 U. S. 264, 282, 308.

It necessarily follows that, if the power be not an unlimited one, Congress cannot pass any Act it pleases. The judicial duty still remains to enforce the fundamental law.

(3) As the power, which is asserted, is an implied power, the statute has constitutional validity only if it is a law "*necessary and proper*" for carrying into execution the power of Congress to provide for the conduct of a war. The limitations of the implied power thus inhere in its constitutional definition. To say that Congress merely because we are at war can pass any Act it pleases, without regard to the exigency, is to ignore the only ground upon which Congress may legislate. The question necessarily is whether the statute has that *direct relation* to the conduct of the war that it may be said to be an act of legislation necessary and proper for that purpose. This is a judicial question.

(4) To constitute a valid exercise of power, the statute must be found to be within the constitu-

tional authority of Congress not only at the time of its enactment but *at the time that it is enforced.*

Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146, 162, 163.
Minnesota Rate Cases, 230 U. S. 352, 473.
Missouri Rate Cases, 230 U. S. 474, 508.
Perrin v. *United States*, 232 U. S. 478, 486.
Johnson v. *Gearlds*, 234 U. S. 422, 446.
Lincoln Gas Company v. *Lincoln*, 250 U. S. 256, 268.

It is plain that a war may present a great variety of exigencies. There might be a war with Haiti, which would involve only a few naval forces and present no basis whatever for legislation regulating the internal concerns of the American people. There are small wars as well as big wars, and if the mere existence of war, even actual warfare, justified any legislation Congress might please to enact, however it might override constitutional principles otherwise applicable, then our system of government may at any time be entirely subverted by some petty conflict. All State laws could be displaced, upon an utterly unwarranted assumption of necessity, in a situation which, presenting no serious exigency whatever from a military standpoint, would still be war in law and thus call into play the war power of the Nation.

We fully appreciate the broad discretion confided to Congress in the exercise of its essential authority for the protection of the life of the Nation. Courts will not substitute their judgment for that of Congress in matters of war policy. But, giving to the war power its broadest possible content, it cannot be used to destroy the Constitu-

tion itself by a disruption of all State power over matters concededly reserved to the States, where it is apparent that the action of Congress is not addressed to the conduct of war. For example, if we had a war with Haiti, it is not conceivable that this would give to Congress authority to regulate the price of retail sales of clothing from Maine to California.

Not only may there be small wars, as well as big wars, but it is manifest that the exigencies of big wars may terminate before a formal treaty of peace has been ratified. It may happen that the military aim has been completely achieved and that while there has been no treaty of peace the enemy has grounded its arms and lies at the mercy of the victorious nation. We should suppose that the contention would be at once dismissed as utterly untenable that in such a situation the mere fact of a state of legal war would justify the exercise by Congress of a war power in the manner in which it could be exercised during the actual continuance of hostilities. The Constitution is our chart, and the sole authority it confers in such a case as this is to pass laws "necessary and proper for carrying into execution the foregoing powers," that is, to conduct a war. In any given situation, the validity of the legislation must depend upon its relation to the conduct of the war. Is it not plain that there may come a time when action by Congress, although there is a legal state of war, has no direct relation to the conduct of war? And if this is found to be so, then the assertion of the war power is a mere pretext, and a futility, just as futile as the assertion of power to control intrastate commerce in time of peace.

We therefore conceive it to fall far short of the mark for the Government to insist that we are still in a state of war with the Imperial Government of Germany. The question is not whether we are in a state of war, but whether a statute enacted by Congress has, at the time of the transactions to which it is sought to be applied, any reasonable relation to the conduct of the war.

We may refer, without repetition, to the review of the facts, as to the existing exigency, in the brief for appellees in *Tedrow* v. *Lewis*. This review comprises public acts and matters of common knowledge of which the Court will take judicial notice. The military objects of the war had been achieved long prior to October 22, 1919, when this Act was passed, and certainly prior to February and March, 1920, when several of the transactions for which the plaintiffs-in-error have been convicted and fined, took place. The enemy for more than a year had been powerless to continue the war, its military power had been destroyed, and terms which involved a complete surrender had been imposed as a condition of the armistice; and, while the United States has not made a treaty of peace, the other great powers with which we were associated have made a treaty creating a condition of affairs which removes every possibility of menace from the prostrate foe. Our own army has been demobilized, and activities which had a direct relation to the conduct of the war have been abandoned.

In the brief for appellees in the *Tedrow* case, there is a detailed statement with respect to the discontinuance of various war activities.

The Lever Act itself, which had originally been enacted in August, 1917, was a food control measure. But prior to the amendment of October 22,

1919 (the only provision pertinent here), the Food Administration had gone out of existence. As the Government says in its brief in the *Cohen Grocery* case (p. 6), "Congress deemed it unwise or unnecessary to continue the Food Administration as it had existed during actual hostilities." And again (p. 36), "Under this section" (referring to section 5 of the original Lever Act) "the President organized the Food Administration, and, through it, administered a license system, by which he controlled the prices of necessaries. After the Armistice, however, and when it seemed probable that actual hostilities would not be resumed, Congress evidently felt that it was not longer necessary to appropriate the funds necessary to continue the expensive Food Administration, and the licensing system went out of existence." Thus, we had gone through the severe struggle of the war, when the Nation was summoning all its resources to a stupendous effort, without any provision for the control of prices of "wearing apparel", which were not within the original Lever Act, and after the Food Administration relating to the most vital of necessities had been discontinued, and a year had elapsed since the Armistice, the amendment was enacted bringing "wearing apparel" within the Act and asserting control of intrastate retail sales under the penalty of criminal prosecution.

In *Hamilton v. Kentucky Distilleries Co., supra*, it was assumed that the implied war power of Congress "must depend *not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, * * * but upon some actual emergency or necessity arising out of the war or incident to*

it'' (251 U. S. p. 161). That was a case involving the validity of the War-Time Prohibition Act and, in view of the nature of the subject matter the Court sustained the exercise of power, but the *rule of limitation* was distinctly recognized.

In the subsequent case of *Ruppert* v. *Caffey, supra,* the doctrine of the *Kentucky Distilleries* case was applied, and the question was not as to the existence of the rule of limitation, but merely as to its application. The fundamental principle involved, which underlay the earlier decision, was emphatically stated by the dissenting Judges, who had concurred in the decision in the *Kentucky Distilleries* case. Thus, it was said in the dissenting opinion of Mr. Justice McReynolds (*Ruppert* v. *Caffey,* p. 308):

> ''By considering the circumstances existing when the War-Time Prohibition Act was challenged, in order to reach the conclusion announced in *Hamilton* v. *Kentucky Distilleries & Warehouse Co., supra,* this court asserted its right to determine *the relationship between such an enactment and the conduct of war;* the decision there really turned upon an appreciation of the facts. And *that the implied power to enact such a prohibitive statute does not spring from a mere technical state of war but depends upon some existing necessity directly related to actual warfare, was recognized.''*

It is therefore far from sufficient for the Government to insist that we are still in a state of war with the Imperial Government of Germany. The question is not whether we are in a technical state of war, but whether a statute enacted by Congress at the time of the transactions to which it is sought to be applied, has any reasonable relation to the conduct of the war.

The conduct of the war must, of course, be distinguished from the economic consequences of the war. If legislation dealing with all economic consequences of war were justified by the war power, then the war power could be exercised for a generation or perhaps longer. The matter is one of vital importance, for while the entire strength of the Nation, regardless of State lines, must be at command for the success of the National arms, it is impossible to conceive that the States surrendered their power to the Federal Government with respect to their own domestic concerns, in exigencies that had no relation to the success of the National arms. The express power is to declare war, to maintain armies and navies. These powers have reference to military aims, to defense, or, for that matter, to conquest. The objective as shown by the terms of the express power is a military objective. It has been well said that the power to wage war is to wage war successfully, but this means the waging of war upon an enemy, not the waging of war upon the citizens of this country. When the military ends are satisfied, when the enemy is down and cannot get up, when there is no prospect of any danger to our security, when our Army has been absorbed in the varied vocations of civil life, when the whole country is adjusting itself to the conditions of actual peace, we submit that it is entirely beyond any authority conferred by the Constitution for Congress to attempt, on a pretense of war, and merely because of the absence of a treaty, to step into a State and tell its citizens how they shall sell wearing apparel in intrastate trade.

The Government refers to a statement in the opinion in *Stewart* v. *Kahn*, 11 Wall. 493, 507,

where it is said that the war power "carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." This statement must, of course, be taken in its relation to the particular subject under consideration. It was manifestly appropriate in connection with the question decided, which arose from an Act of June 11, 1864, enacted in the midst of the Civil War which provided in substance that, wherever judicial proceedings had been interrupted by the war, the period of such interruption or of resistance to the laws should not count as a part of the time limited for the commencement of actions. Such a decision, and the statement quoted from the opinion, cannot be taken to imply an authority in Congress by the exercise of the war-power to pass any Act to "remedy evils," in a broad sense, which may flow from war. Refusal of opportunity to sue after judicial process is again available would amount to virtual destruction of property rights. And, it is not questioned but that war activities must be wound up and that proper time must be allowed for that purpose. To reason, however, from such an exercise of authority to the assertion of a broad power unessential to vindication of rights, unconnected with the winding up of war activities, and unrelated to the success of the national arms, or the conduct of war, in order to establish control of intrastate concerns upon the ground that intrastate business reflected an economic condition which was the result of the withdrawal from production of men and materials in the course of military effort, would constitute a plain *non sequitur*. For, if this reasoning were ac-

cepted and it were regarded as a permissible exercise of the war-power to remedy any economic condition which might be regarded as resulting from the limitation of production during the war, Congress might now, and very likely for many years to come, exercise an authority which would entirely subvert the Republic. Joining the conception thus advanced to the notion that the discretion of Congress in the exercise of power must be broadly sustained, there would be no conceivable limit to the exercise of Federal authority for an indefinite time with respect to economic conditions.

Such a theory, it is submitted, cannot be entertained, because it loses sight of *direct relation* to the conduct of war, that must be found as the constitutional warrant for the exercise of war-power. It is this distinction which makes possible the maintenance of constitutional government in this country. For, if the distinction between direct and indirect relation should be overlooked, then most of the important express powers of Congress would at once have a breadth of application which would be destructive of the powers reserved to the States, and hence of our constitutional system itself. If, however, the distinction is maintained between the authority to do that which has direct relation to the conduct of war, then nothing is lost which is essential to national security, while the Constitution automatically operates to maintain unimpaired its distribution of power between Federal and State authority after the military exigency has passed.

We respectfully urge that Congress had no power to undertake the regulation of the prices of wearing apparel in local sales at the times specified in this indictment.

THIRD.—It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times mentioned in the indictment, to deprive plaintiffs in error of the then fair market value of their property by denying them the right to contract for its sale at such fair market value. If the statute in question be construed as the District Court construed it, it is invalid as a deprivation of property without due process of law in contravention of the Fifth Amendment.

(1) It is not open to controversy that the war power is subject to applicable constitutional limitations.

> *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146, 156.
> *Ex parte Milligan*, 4 Wall. 2, 121-127.

One of these applicable constitutional limitations is the due process clause of the Fifth Amendment. Congress has the amplest power to raise by taxation all the money it needs, but if it takes private property for the conduct of the war it must pay for it. Its obligation not to take private property except for public purposes and only on payment of just compensation continues. Even when property is impressed for the use of the Army, under imperative military exigency, the Government must pay for it.

> *Mitchell* v. *Harmony*, 13 How. 115, 134.
> *United States* v. *Russell*, 13 Wall, 623, 627-629.

The only exception is with respect to property destroyed by military operations in the actual

theatre of war (*United States* v. *Pacific Railroad*, 120 U. S. 227, 239).

There is no military exigency which authorizes the Government to compel a citizen to give his property away. War does not abolish the fundamental guarantees of the Constitution or authorize confiscation. The duty of the citizen to render military service is fixed by the Constitution itself. And, further, the protection of the citizen against arbitrary and tyrranical exaction may be far more important in time of war, when feeling runs high, than in time of peace. After referring to the Fifth and Sixth Amendments, this Court said in the *Milligan case, supra*:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

(2) It necessarily follows that the *regulation* of the use and disposition of private property in time of war must be consistent with due process of law. That regulation affecting prices or rates may constitute deprivation of liberty and property without due process of law is well established. The principle is applied even in the case of services

pursuant to a public undertaking (*Stone* v. *Farmers Loan & Trust Co.*, 116 U. S. 307; *Smyth* v. *Ames*, 169 U. S. 466; *Minnesota Rate Cases*, 230 U. S. 352).

There can be no controversy as to the construction which the Court below placed upon the statute in question, or of the character of the regulation which was thus held to be established. The statute relates not to a public undertaking, but to a private business. It has been made to extend to lawful business of an ordinary sort, such as that of a retail clothing store. While the statute aims at the regulation of prices, it is even less defensible than a statute which fixes prices, for the statute does not fix them or provide the means for fixing them. It is conceded by the Government that the so-called "price-committees" or "commissioners" appointed by the Department of Justice are wholly extra official, and that their action, while it may influence the Department, affords no legal protection to the merchant (Gov't Brief in *Kennington* v. *Palmer*, No. 367 of this Term, p. 9). The statute does not even have the merit of a price-fixing statute in establishing any uniform price or standard of prices. Nothing is provided by the Act to which the unfortunate merchant may appeal in his effort to conjecture the scope of its restriction. In each case, abandoning all the standards which free competition, or what Adam Smith called the "higgling of the market," may have provided, the jury is left to determine with respect to every particular transaction, albeit but an infinitesimal part of a large business—the course and results of which are not considered—that an "unreasonable" price has been charged.

The test, as the Court below construed the statute, is simply *the difference between cost and sell-*

ing price and the opinion the jury may have of the reasonableness of this difference. If a retail dealer bought a coat in 1916 for $40 and in October, 1919 (when the Act was passed), its market value was $80, and its value has further increased in 1920, although the sum of $80 by reason of the general rise in prices may amount to but little if any more in 1920 than $40 amounted to in 1916, still it is open to a jury to say that because the dealer had bought the coat for $40 and sold it for $80 he is guilty of a crime and should be fined or go to jail. He might still go to jail if he sold the coat for $60 although he could not replace it for much more.

The statute as thus construed would present a sufficiently serious question, if one was not engaged in trade and had only one coat to sell. But when he is dealing in clothing, and must go out of business unless he can replace his stock, a regulation of this kind would seem to be little short of grotesque. The statute, so construed, is of a character which neither affects nor regards market values.

It is axiomatic, that the trader, although money is used as a convenient medium, is really engaged in the exchange of commodities for commodities, and if he is to continue in trade he must take account of all the risks that attend the ever present necessity of replacement. In fixing prices, he must take account of what goods will be worth and money will buy when he comes to replenish his shelves. The ability to do this with accuracy is extremely rare, and hence the large percentage of failures in business, even in ordinary times. When goods are high, the play of economic forces will in time cause them to fall; a period of inflation will be followed by a period of depression, and

unless in times of high prices these risks are taken into account, the merchant must inevitably fail. It was not so long ago that raw silk was selling at upwards of $15 a pound; it is now selling at about $7 a pound, and merchants who were most prosperous only a short time ago are not only suffering from financial embarrassment but some have actually become suddenly insolvent because of the sharp decline. A rule which makes, especially in individual transactions, a comparison of cost and selling price the measure of unreasonableness without regard to market or replacement values is a rule upon which business could not be conducted. We may quote from a recent and admirable treatise on this subject "Does Price Fixing Destroy Liberty", by George H. Earle, Jr., of Philadelphia:

> "* * * Raw sugar advanced in price within the past year from five to ten cents per pound, and thence to twenty cents per pound, and even still further. If the refiner sold his sugars at a reasonable profit on the first price of five cents, the inevitable consequence would be that he could 'replace' only half of his necessary supplies. And then suppose, this supply, though only one-half his requirements, again advanced to twenty cents per pound for raw sugars, and he took but a living profit, he would have come within the Government's contention as to his duty under the terms of the Lever Act, even though each 'turn over' in such a course of business would bring him that degree closer to financial ruin" (*id.*, pp. 103, 104).

With the advance in the cost of labor and of raw materials, the cost of manufactured articles could not fail to advance, and at what point is

the unhappy dealer, who is expected to ignore the standard of fair and open competition—the only one that business knows, or the law hitherto has known—to fix the amount at which he can safely replace his stock and take all future risks inherent in his trade?

To be sure, these considerations are economic, but due process of law in dealing with property rights cannot be administered in a vacuum. Process of law which took no account of economics would be most arbitrary process and anything but "due". As was said by Mr. Justice Holmes in the *Northern Securities* case (193 U. S. pp. 197, 401, "at times Judges need for their work that training of economists or statesmen, and must act in view of their foresight of consequences." And the Lever Act cannot be judged either as to its construction or validity without taking account of fundamental economic considerations.

The constitutional right to engage in an ordinary lawful trade involves the right to continue in that trade and to sell goods in such manner that one can turn over his stock, take the risks of his business and have a measure of profit. Accordingly it is recognized that "the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value" (*Branson* v. *Bush*, 251 U. S. 182, 187). The conception of property thus necessarily involves the enjoyment of its use and the opportunity to realize its value. If one is denied either, his property is taken. Property is not its cost, but its worth; and just

compensation for property is not compensation for cost, but for value (*Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 409; *Minnesota Rate Cases*, 230 U. S. 352, 454).

Even a corporation engaged in a public undertaking is entitled to have taken into consideration, in the fixing of its rates for public service, the increased value of the property used in the service since its acquisition (*Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 51), and its necessary replacements (*Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 13).

As has been said, the Court below declined to permit the plaintiffs in error to prove the market value of the articles in question either at the time when the statute was enacted, or at the time the articles were marked for sale, or at the time they were sold. The Court went upon the theory that market value, although fixed by free competition in ordinary articles, in no sense the subject of monopoly or of unfair practice, was without relevancy. This was because the statute, as construed by the Court, ignored that standard.

Congress could not without compensation destroy the existing value of private property by imposing a regulation that it should be sold for less than its fair market value as it stood at the time of the enactment. Nor could Congress destroy the existing value of a business, as a going concern, and deprive a merchant of his liberty to conduct his business, by imposing a regulation requiring the liquidations of stocks at a price less than their fair market value at the time of the enactment and at a price less than that at which it was possible to replace them. Nor could Congress, it is further submitted, destroy the value of

a lawful business by refusing to the merchant engaged in it a fair opportunity of realizing upon his stocks and a further amount sufficient to afford a reasonable profit over and above the replacement value of such stocks in trade.

If Congress, on October 22, 1919, when for the first time it brought *wearing apparel* within the statute in question, had authorized the acquisition by the Government of the suits of clothes in the store of Weed's, Inc., the Government would have been compelled to pay the fair market value at the time of the appropriation, and, without provision for such payment, the attempted acquisition by Congress, despite the assertion of the war-power, or the fact that the appropriation took place in the midst of the actual conduct of war, would have been entirely nugatory. If Weed's, Inc. had had a contract with *X* for the sale of suits in question on October 22, 1919, and *X* had declined to carry out his contract, Weed's, Inc. would have been entitled in any court of justice to recover damages with respect to the then market value of the suits, and Congress could not have taken away such a cause of action from its owner without just compensation. In one court room, Weeds, Inc. would be recovering damages on this theory of its right to market value, while in an adjoining court room, it would be sentenced as a criminal for charging that market value as a selling price. We find it difficult to understand upon what theory it can be said that Congress, unable to take a suit of clothes for the use of a soldier without paying its fair market value, could validly require the owner of the suit to sell it for less, or if the owner was engaged in trade to sell such suits for a price which would not enable him to

replace them according to their fair market value, and thus practically compel him to go out of business.

Mr. Justice Brewer said in *Chicago & Northwestern R. R. Co.* v. *Dey*, 35 Fed. 866, 880, that it was no answer to say that, if a railroad company found that imposed rates would cause it to do business at a loss it might quit business and abandon its road. That, he said, would be "the very irony of despotism. Apples of Sodom were fruit of joy in comparison".

There being, then, no question upon this record, that Weed's, Inc. on October 22, 1919, owned certain articles of clothing, as a part of their stock in trade, which they had purchased long previous, and that under this statute as construed they were denied the opportunity to obtain the fair market value of these articles at the time the statute was passed, or the fair market or replacement value at the time of their sale, we submit that it necessarily follows that the statute having such an application, without compensation to the owner, constitutes a deprivation of property without due process of law.

Moreover, it is of the essence of due process of law that it shall not constitute arbitrary legislation which deprives a citizen of the equal protection of the laws. It is true that the words "equal protection of the laws" are not found in the Fifth Amendment, but the principle involved is included in the concept of due process of law.

Caldwell v. *Texas*, 137 U. S. 692, 697.
Giozza v. *Tiernan*, 148 U. S. 657, 662.
Brushaber v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24, 25.

McGehee on Due Process of Law, p. 60.
2 Willoughby on the Constitution, pp. 873, 874.

The present statute arbitrarily deprives citizens of the equal protection of the laws and thus of due process of law. Thus, the theory of the Court below that the statute refers simply to the difference between cost and selling price, and that the jury is at liberty, regardless of fair market value, to treat the difference as an unreasonable one, permits A to escape while B is made a criminal, *although they sell the same staple on the same day at the fair market price*, because they bought the article at different times and hence at different costs.

Take, for example, the case of sugar, imported. When A imports, it costs him a given sum. The market is rising, and when B imports, it costs him a little more; and the market still rising, when C imports, it costs him a still greater sum. Then each having imported and having the right to sell, A, B and C sell on a given day at the market price. The Government assumes that A must go to jail because of his lower cost and is not entitled to the market price which B and C are permitted to enjoy.

Again, under this sort of regulation, if a clothing merchant has a stock of suits bought at different times, as is most likely to be the case, although on a given day they may all have the same fair market value, established by open competition, he must sell them at different prices or be guilty of a crime. What is a fair price to one customer becomes an extortionate price on the same day of the same article to another customer. The

absence of any standard, or uniform rule, but the establishment of a plan of regulation which takes account only of a jury's opinion of the difference between cost and selling price, makes it impossible for the merchant to assure a proper replacement value. A statute of such a sort does not establish a market value or a fixed basis for trade, but leaves to each merchant the risks of his dealing while market values may continue to rise.

(3) The Government, to support its contention, invokes the analogy of the police power of the States. We understand the proposition of the Government to be this (Gov't Brief, *Cohen Grocery Case,* pp. 19 *et seq.*):

That the States under our system have all the powers which inhered in the British Government prior to the Revolution, save only as these have since been surrendered to the Federal Government; that by virtue of these powers, the States respectively may fix the prices of commodities in private sales; and that Congress in the exercise of its war power can exert all the police power which a State could ordinarily exert over the same subject.

The foundation of the Government's argument is thus a most extraordinary assumption. It assumes that a State, despite the Fourteenth Amendment, has authority to fix the prices to be charged, in private sales, of all wearing apparel. It may be suggested that this view of the scope of the State's police power has not yet received the sanction of this Court (Compare *German Alliance Insurance Co.* v. *Kansas,* 233 U. S. 389, 415). The Government makes its appeal to the familiar statutes of an early period relating to forestall-

ing, regrating and engrossing and various statutes fixing prices (Gov't. Brief, *Cohen Grocery Case*, pp. 24, 25). Of these discredited efforts of an early period, Mr. Chief Justice White, writing for the Court in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 55, said:

> "From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the Statutes of 12th George III, ch. 71, enacted in 1772, and Statute of 7 and 8 Victoria, ch. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade. * * * This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. * * * After all, this was but an instinctive recognition of the truisms that the course of trade could not be made free by obstructing it and that an individual's right to trade could not be protected by destroying such right".

The due process clauses introduced into the State Constitutions recognized freedom of trade and put it beyond the power of State Legislatures to interfere with essential liberty in an ordinary lawful calling. And the due process clause of the

Fourteenth Amendment, as interpreted by this Court with due regard for the broad scope of the police power in protecting the life, health, safety and welfare of the people of a State, still recognizes the necessary restrictions—now enforced by Federal authority—which must be maintained in order that both liberty and property shall be secure. The recognition of protective legislative authority in matters with respect to monopolies, unfair practices, rates or charges for public service, and matters affected with a public interest (*Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389), still leaves property rights protected from arbitrary or confiscatory regulation.

In the case last cited, the opinion of the Court answered the argument that its decision justified general price fixing by saying (233 U. S. p. 415):

> "But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with the public interest' and therefore 'subject to be controlled by the public to the common good.' "

The Government cannot measure State power, under the Fourteenth Amendment, by the statutes of Edward I.

But this does not exhaust the Government's assumption. For the assumption is not simply that the State could exercise its police power in fixing prices of all wearing apparel, but that the State Legislature, without fixing prices or establishing any standard of prices that it was possible to know, could deprive a trader of the right to realize either the fair market value of his stock as it stood at the time of the enactment, or its fair market value as it stood at the time of its sale. More than that, the Government assumes that the State Legislature, thus ignoring fair market values, and leaving it to a jury to say that in its opinion a price charged was unreasonable, although it was a fair market value, could make a merchant a criminal for realizing the fair market value of his goods when other merchants were left at liberty to obtain that market value.

The Government's assumption that a regulation of this sort is within the police power of the State is a wholly gratuitous and unwarranted one, and the entire foundation of the Government's argument disappears.

FOURTH.—The Court below construed the statute erroneously.

As a constitutional question is involved, this Court takes the entire case, and the question as to the correct construction of the statute is before the Court.

Towne v. *Eisner*, 245 U. S. 418.
Billings v. *United States*, 232 U. S. 261, 279.
Altman v. *United States*, 224 U. S. 583, 596, 597.

(1) Six of the seven counts upon which the defendants were convicted are under the provision of Section 4 of the amended Lever Act making it unlawful

> "to make any unjust or unreasonable *rate* or *charge* in handling or dealing in or with any necessaries."

The words "rate or charge" are not apt words to describe the *price* in a contract of sale. If Congress intended to hit prices fixed by individuals on sales of goods, it is difficult to suppose that Congress would have used the expression "rate or charge in handling or dealing in or with any necessaries." The reference apparently is to rates or charges for services in connection with handling, transporting, storing, etc., and the words "dealing in or with" would have on familiar principle a reference to transactions of a similar kind.

Congress in the same section, when it intended to refer to "prices" used the word "prices" (see Section 4, Subd. (e)), where the prohibition is against a combination or conspiracy "to exact excessive prices."

Further, the scheme of the statute must be taken into consideration, and it is to be observed that under Section 14 the President is authorized to fix a "guaranteed price" for wheat, and under Section 25 to fix the "price" of coal and coke. In short, the Act shows that when Congress had price-fixing in mind, or regulation of "prices," it said so, and Congress did not refer to "prices" in the provision of Section 4 upon which six of the counts in question rest.

(2) If, however, it is considered that the provision as to an "unjust or unreasonable rate or

charge" covers prices on contracts of sale, the construction of this provision by the Court below cannot, we submit, be sustained.

On the theory of the scope of the clause adopted below, the words "unjust or unreasonable rate or charge" are treated as having the same effect as the words "excessive prices" in Subdivision (e) of Section 4.

But what is the meaning of "excessive prices"? "Excessive prices" mean prices in excess of *something*. Plainly, reference is to a price exceeding some *standard* contemplated by the Act, and this must be a standard that dealers can know (*International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634).

It is also a fundamental rule that where a statute is susceptible of two constructions "by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided," the Court will adopt the latter (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408; *Union Pacific R. Co.* v. *Laramie Stockyards*, 231 U. S. 190, 200). Again, the statute is a penal statute, and while a penal statute should not be construed arbitrarily, there is enough left of the old maxim to require that it should be construed sensibly and should not be stretched. To say that Congress in using the term "excessive prices" meant prices which exceeded something that no merchant could define, and which Congress did not attempt to define, is to wrest this highly penal statute from its proper meaning, and to give it a construction which not only raises grave doubt of its constitutionality, but, as we view it, makes it clearly unconstitutional.

The question, then, is, What standard did Congress contemplate when it used the expression "excessive prices"?

If an article were of an exceptional character, not the subject of ordinary trade, with a *pretium affectionis*, in the nature of things there would be no excessive price. The owner would have a constitutional right to sell it for what he could get for it or otherwise to hold it.

In the present statute, the reference is to staples, to the most familiar subject of every-day barter and trade. With respect to such articles there is a familiar standard, a legal standard, the standard every day judicially applied in giving legal effect to contracts of sale. There is a standard not only applied in this way, but also invariably applied when government steps in and exercises its sovereign power to take such property from the citizen.

This standard, of course, is the standard of *fair market value*, the value determined by the myriad wants of the community, the extent of the supply, and the intensity of the demand. It is a standard to the maintenance of which the power of government is constantly devoted. For when Acts in restraint of trade are condemned, and attempts to monopolize are made the subject of penal provision, the endeavor is to secure free competition in order that fair market prices may be established in the only way in which they can be established, and that is by getting rid of unfair practices and permitting the free play of economic forces.

If there had been no other clause in the section but the prohibition of conspiracies "to exact excessive prices," we can hardly conceive of a view of the statute which would ignore market values. The normal meaning of "excessive prices" would be prices which through the conspiracy were in-

tended to exceed the fair market value of the article.

Congress, in its war legislation, did not attempt to ignore the right of the citizen to the fair market value of his property. The Government was to make "just compensation" (see, *e. g.* Act of March 4, 1917, c. 180; 39 Stat. 1192, 1193) and where articles were taken with market value of course "just compensation" meant their fair market value. It may here be observed, as counsel noted in argument before the Court below, that even when Congress undertook to authorize the disposition of the nitrate of soda, which had been acquired during the war and was still on hand, by authorizing its sale to agricultural fertilizer distributors or users, it was provided that the sale should be made at the prevailing market price. Although this Act was passed, as it states, to meet an existing emergency in the shortage of fertilizers, it was directed that the Secretary of War should sell at the prevailing market price although this price was considerably in excess of what the Government had paid. (See Act of April 23, 1920, 264 Fed. p. 465, Sec. 6941-l, Cong. Rec. 66th Cong. 2nd Sess. pp. 5906-5907). It can hardly be supposed that Congress had the intent to compel purchasers from the Government to buy at market prices, while at the same time it was through the Lever Act compelling its citizens to sell for less than the fair market value of their wares. We repeat that "excessive prices" must be deemed to mean prices in excess of fair market value.

The question then is whether the words "unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" should receive, so far as prices are concerned, a different interpretation from that properly to be given to

the phrase "excessive prices." It would be difficult to construe these expressions differently, as the only way of treating the words "rate or charge" as referring to prices at all would seem to be by a recognition of the same intent as governing both expressions. If this be so, "unjust or unreasonable rate or charge" would refer to the same standard to which the expression "excessive prices" should be deemed to refer.

The word "unreasonable," if the provision can be sustained, must imply some standard, and a standard that a merchant can know. The word "unreasonable" as applied to a price, like the word "excessive," would normally be taken to mean, when referring to a staple, where there is a free market and a fair market price fixed by competition, to the fair market value of the article.

The statute says nothing about profits, or percentage of profit. It deals, on the assumption that it applies at all, with prices, and we ask—Upon what ground can it be said that a merchant is charging an "unjust" or "unreasonable" price when he is charging the fair market value of his article?

Moreover, when we are referring to "market values," it is not necessary to consider in this case simply the question of retail values. The Court below refused to permit evidence of the wholesale market value and held that the statute ignored it. The wholesale market value necessarily represented to the merchant the replacement value of his stock in trade. If the consideration of profit can be deemed to affect the matter under this statute, then certainly the retail merchant would at least have the right to a reasonable profit upon the wholesale market value. But to disregard market values altogether, and to take sim-

ply the difference between the cost to the merchant of a particular article and its selling price, and to leave it to a jury to say whether or not the difference was unreasonable, is to make a different statute from that which Congress enacted, and to give a construction to the statute which necessarily renders it invalid.

The law knows no standard of profits. The only standard that a merchant has, and the only standard recognized by the law, with respect to prices, is the standard of market value.

The use of the words "unjust" and "unreasonable," with respect to transactions in trade, must be deemed to refer, if they are not utterly indeterminate, to conduct which is in restraint of trade, or to unfair practices which embarrass and obstruct the free flow of commerce and thus interfere with the free competition upon which the law insists. To give the words "unjust" and "unreasonable" a wider import, is to ignore their historical setting.

In *Standard Oil Company* v. *United States*, 221 U. S. 1, in considering the meaning of the words contracts, combinations and conspiracies "in restraint of commerce among the several States" and "attempts to monopolize" and "monopolize," this Court, speaking through Mr. Chief Justice White, said (*id.*, p. 51) that the endeavor would be made to seek their meaning by reference "to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the Anti-trust Act." Mr. Chief Justice White continued (*id.*, pp. 56, 57, 58, 60, 62; italics ours):

> "From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual

to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule of the English law. The scope and effect of this freedom to trade and contract is clearly shown by the decision in *Mogul Steamship Co.* v. *McGregor* (1892), A. C. 25.

* * * * * *

"It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our Government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly, sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurrence of the evils recognized in the mother country as consequent upon monop-

oly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results.

* * * * * *

"Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought *would flow from the undue limitation on competitive conditions* caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.

* * * * * *

"Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

* * * * * *

"And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract."

And in *United States* v. *American Tobacco Company*, 221 U. S. 106, 180, the Court said:

"The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and *to prevent that act from destroying all liberty of contract and all substantial right to trade*, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us." (Italics ours.)

And, in again stating the rule of reason, the Court said in the *Tobacco case* (*id.*, p. 179):

> "Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations *which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.*" (Italics ours.)

As was said in *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 82, re-stating the conclusion thus reached:

> "The Act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and unduly suppress or restrict the play of competition in conduct thereof."

The rule of reason is the rule that must be taken to define what is unreasonable, and in connection with contracts in restraint of trade, or conduct which led, as the Court had pointed out, to the enhancement of prices, the conduct that was thus found to be "unjust" and "unreasonable" was the conduct which *unduly restricted competition* or

unduly obstructed *the due course of trade* or which, because of the inherent nature of the acts, injuriously restrained trade. But the power to make normal and usual contracts, the resort to free and open competition, did not offend the rule of reason because from the standpoint of the law such conduct was neither unjust nor unreasonable.

"Excessive price," if this term have any legal significance, is a price produced *by illegal or unnatural means and not by free competition.* "Unreasonable" price, if this term has any legal significance, means a price reached by some illegal or unnatural practice, the illegality being defined by the conceptions of the law so clearly set forth in the opinions we have quoted. We shall not undertake to comment upon the economic futility of an attempt to establish by statute fair prices of ordinary articles of commerce which are the subjects of open competitive dealing. But, if statutory price-fixing of ordinary articles is a futile proceeding, what shall be said of a statute like this, which does not even give a statutory standard price, but menaces every merchant, however honorable, and deprives him of the fair market value of his wares. Aside from any question of the economic effect of the statute, we insist that as a matter of mere statutory construction the words "unjust or unreasonable" or "excessive" cannot be regarded as ignoring all prior legal conceptions, and thus by departing from the only standard known to the law as intended to leave it to a jury to say what profit it thinks a merchant should make upon a comparison of the cost and selling prices of particular articles.

In the present case there is no suggestion of any method or practice on the part of the plain-

tiffs in error which prior to the enactment of the Lever Act could have been regarded under the law as "unjust" or "unreasonable." If Congress in enacting the Lever Act meant to refer to any standard already existing, by the use of the words "unjust" or "unreasonable", then by every such standard there was no unjust or unreasonable price. If Congress attempted to authorize a departure from every known standard of reasonableness, and to disregard the standards erected by fair and free competition, then it is apparent that it utterly failed to define any standard whatever.

We ask the Court, in construing this statute, under which honorable merchants, with unblemished reputation in their community, have been convicted as criminals—*What upon this record have they done which prior to the Lever Act any court could have regarded as unjust or unreasonable? And if what the plaintiffs in error did was not "unjust" or "unreasonable" under the law as it stood prior to the Lever Act, by what criterion furnished by that Act is their rate or charge or price to be held to be unjust, unreasonable or excessive?*

The argument that if this be the true view of the statute, there was no reason for its enactment, as an Act merely appealing to existing standards, is manifestly without merit. The terms of the Act cannot be changed by any such suggestion, and even Legislatures sometimes enact futilities. But, apart from this, the manifest purpose was to make the objectionable conduct criminal and to af-

fix Federal penalties. Whether Congress had any power to do this we discuss elsewhere, but that is a matter apart from its intent.

Congress evidently sought to make certain conduct a Federal crime, which aside from the enactment would not have been a Federal crime, however objectionable it might be. The question, then, is, What is the conduct thus sought to be penalized? That conduct is defined simply by the words "unjust", "unreasonable" and "excessive". If these words refer to no standard, the Act is void, plainly. If they do refer to a standard, it must be some existing standard of the law. And there is none such except the standard of fair market values established by free competition, and it is precisely that standard which the plaintiffs in error have invoked in vain because the Court has construed the statute as disregarding it.

FIFTH.—The statute, as construed by the Court below, does not validly define a criminal offense and by reason of its uncertainty is invalid under the Fifth and Sixth Amendments.

The statute, as the Court below construed it, ignores the standard of fair market value, not only depriving the merchant of the worth of his property in the market, but of his opportunity to measure prices by the market. In disregarding market values as fixed by free competition, the statute necessarily disregards altogether the criterion of *worth*. If it be said that the intention is to refer to some supposed standard of *"real value"* as distinguished from market value, it at

once encounters the fatal objection which was urged against the statute in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216. For there the statute, as construed by the State court, attempted to make it a criminal offense to sell harvesters, etc., at a price "in excess of their real value". The dealer was compelled to imagine conditions other than those that actually existed, and in the light of conjectural circumstances guess at his peril the "real value" of his commodity. This statute was aimed at an abnormal situation, existing in the absence of free competition, and the legislative endeavor was to compel the dealer to refer to a standard which did not exist. The Court said that this situation concerned the constitutional question, "for it shows how impossible it is to think away the principal facts of the case as it exists and say what would have been the price in an imaginary world" (*id.* 222). "Value", said the Court, "is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact and generally is more or less easy to ascertain". But the Legislature had no power to compel the dealer to refer to some standard of "real value" which ignored actual conditions, as this was an attempt to prescribe a standard of conduct that it was not possible to know (see *Collins* v. *Kentucky*, 234 U. S. 634, 638). The statute in the present case cannot therefore be sustained by reference to some supposed "real value", as distinguished from market value under the conditions that actually existed, and as it ignores the latter it must be taken to disregard the *worth* of articles altogether.

Then, as already stated, the statute does not fix prices or establish any machinery for fixing prices.

Even in a case where prices or rates may be fixed constitutionally, the rate-making power is unconstitutionally exercised if penalties are imposed in the endeavor to compel obedience without any opportunity to resort to a judicial review to determine the propriety of the rates. In *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, an order of the State Corporation Commission had declared a laundry to be a monopoly and its business public, and had limited its rates. But under the constitution and laws of Oklahoma, no Court of the State, except the Supreme Court by way of appeal could review, correct or annul any action of the Commission within the scope of its authority or suspend its execution, and the Supreme Court might not review an order fixing rates by direct appeal from such order. The only judicial review of an order fixing rates that was found to be possible under the laws of the State, was that arising in proceedings to punish for contempt. But the penalties which might be imposed, if this course were pursued without success, were such as to deter "even the boldest and most confident". It was said that obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore that the provisions of the Acts relating to the enforcement of the rates by penalties were unconstitutional without regard to the question of the insufficiency of those rates. Accordingly, it was held that the plaintiff was entitled to a temporary injunction restraining the Corporation Commission from enforcing the penalties and that the suit should proceed for the purpose of determining whether the maximum rates fixed by the Commission were under existing conditions confiscatory.

So that, here, if there had been an attempt to fix prices and there was no opportunity for judicial review in order to secure protection against a confiscatory imposition, the merchant would have been entitled to the intervention of a Federal Court of equity under the Constitution to stay the enforcement of penalties until the validity of the rates could properly be examined (see *Ex-Parte Young*, 209 U. S. 123, 147; *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 343, 349; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 662). But as the present statute does not attempt to fix prices, or to provide any machinery for fixing prices, the unfortunate merchant is under a penalty of criminal prosecution with no possible redress *unless he is able to conjecture in advance what a jury may think, with respect to the sale of each particular article in which he deals, he should be allowed as the difference between the cost of that particular article and the price he charges.* There is nothing in the way of judicial determination that can intervene between his act and criminal prosecution.

If the provision that the accused in all criminal prosecutions shall "be informed of the nature and cause of the accusation" is not a meaningless form of words, it would seem to be clear that legislation of this sort cannot be regarded as validly defining a crime.

For what is the meaning of the "nature and cause of the accusation"? Does it mean that it is sufficient to say that he is charged with what is "unjust" or "improper" or "wrong" or "unreasonable" without reference to any criterion of justice, propriety, right or reason? This would be after the manner of the Chinese Penal Code, to

which Mr. Justice Brewer refers in *Railroad Co. v. Dey*, 35 Fed. 866, 876, where it was provided:

> "Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of very serious nature, with eighty blows."

If such legislation as the present statute is valid, if imprisonment can be imposed under such wholly uncertain provisions, then Congress could very easily rid itself of all necessity for the exercise of legislative power, within the limits heretofore supposed to exist, by simply enacting that any man that does anything "wrong" or "improper" or "unreasonable" shall be fined and imprisoned. Indeed, such an Act would be far more easily sustained than the present one, for as to a good many things there would be criteria of right and reasonableness which are non-existent here. Is it not perfectly clear that, wherever Congress has a price fixing power, Congress is bound to fix prices with reference to some standards, and that Congress cannot put all ordinary lawful trade under penalty of criminal prosecutions by mere reference to prices as "unjust" or "unreasonable" or "excessive" without any definition of standard?

It will not do to say that Section 4 is aimed at conspiracies, and that conspiracies or combinations to enhance the price of an article fall within a defined category. It may be pointed out that this would apply only to the first count, which is the only conspiracy count in the indictment. But, aside from this, even as to this count the point is without merit, for if the case fell within the sup-

posed category, the criterion of fair price, which furnished a standard for determining the enhancement, would be the fair market value fixed by free competition; and, under the ruling of the Court below, this standard is disregarded by the present statute. All the counts but one deal simply with the act of an individual, and are based upon the provision prohibiting the making of "any unjust or unreasonable charge."

There can be no question as to the principle involved, that a penal statute must, to be valid, define the conduct penalized with appropriate certainty; and that this means that it must create, or refer to, a standard which the person subsequently accused of its violation may know in advance.

In *United States* v. *Reese*, 92 U. S. 214, 219, 220, 221, the Court, through Mr. Chief Justice Waite, said:

> "Laws which prohibit the doing of things and provide a punishment for their violation should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion.
> * * * * * *
> "If the legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.
> * * * * * *
> "It would certainly be dangerous if the leg-

islature could set a net large enough to catch all possible offenders, and leaving it to the courts to step inside and say who could be rightfully detained and who should be set at liberty."

In *United States* v. *Brewer*, 139 U. S. 278, 288, the familiar rule was thus stated:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *United States* v. *Sharp*, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. *United States* v. *Lacher*, 134 U. S. 624, 628."

In *Louisville & Nashville R. Co.* v. *Railroad Commission*, 19 Fed. 679, 691, the Court said:

"The complainant insists that the act is too indefinite to sustain a suit for the penalties therein imposed, the offenses for which said penalties are to be inflicted not being sufficiently defined. The definition of the two principal of these offenses, is,—*First*, the taking of 'unjust and unreasonable compensation;' and, *secondly*, the making of 'unjust and unreasonable discriminations.' But what is unjust and unreasonable compensation, and unjust and unreasonable discrimination? And can an action, *quasi* criminal, be predicated thereon? It was expressly held to the contrary in the case of *Cowan* v. *East Tenn. V. & G. R. Co.*, decided a few years since, at Knoxville, (but not reported,) because, as the learned judge said, 'it would have to be left to a jury, upon the proof, to say whether the difference' in the rates 'was discrimination or not,' and that the same difference 'might in one instance be held a violation of the law and in another not,' thus making the guilt or innocence of the accused dependent upon the

finding of the jury, and not upon a construction of the act. 'This,' he said, 'I think cannot be done.' If this decision is authoritative, it is conclusive of this part of this case. We think the decision clearly right."

There was a similar application of the rule by Mr. Justice Brewer, sitting in Circuit, in *Tozer* v. *United States*, 52 Fed. 917, 919, 920, which applied the doctrine recognized in the *Dey* case, *supra*. Mr. Justice Brewer said:

"But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of *Railway Co.* v. *Dey*, 35 Fed. Rep. 866, 876, I had occasion to discuss this matter, and I quote therefrom as follows:

" 'Now, the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.' * * *

"Applying that doctrine in this case, and eliminating the idea that the through rate is a standard of comparison of the local rate, there is nothing to justify a verdict of guilty against the defendant."

The case of *Louisville & Nashville R. Co.* v. *Commonwealth*, 99 Kentucky 132, involved substantially the same point. The Court said:

> "That this statute leaves uncertain what shall be deemed a 'just and reasonable rate or toll or compensation' cannot be denied; and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the carriers' act, therefore, depends on the jury's view of the reasonableness of the rate charged. And this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment, does not alter the nature of the act. Under this statute it is still a crime, although it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rates reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or admitted to be fixed, by which the carrier may regulate its conduct. * * *
>
> "If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law, but in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws."

See also:

United States v. *Capital Traction Co.*, 34 App. Cas. (D. C.) 92.

Baltimore & Ohio R. Co. v. *Railroad Commission of Indiana*, 196 Fed. 680.

Hocking Valley Co. v. *United States*, 210 Fed. 735, 743.

Chicago, M. & St. P. R. R. Co. v. *Polt*, 232 U. S. 165.

In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221, and *Collins* v. *Kentucky*, 234 U. S. 634, as already noted, it was the absence of any standard of conduct that could be known in advance that was held to invalidate the statute.

There is a still later reference to the principle in the case of *United States* v. *Pennsylvania R. R. Co.*, 242 U. S., 208, 237, 238, which related to an order of the Interstate Commerce Commission requiring carriers to furnish oil tank cars. It was found that the order did not lie within the authority of the Commission, but the Court also dealt with an objection, as to the uncertainty of the order, in the following words:

> "Again, it is charged that the order expressed but a legislative principle, has the generality of such principle without any criterion of application. The order requires the company to 'provide * * * upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.' What is a reasonable request or reasonable notice, and what are normal shipments? The order affords no answer and if the railroad company ventures, however honestly, any resistance to a request or notice not deemed reasonable or to shipments not deemed normal it must exercise this right at the risk of a penalty of $5,000 a day against all of its responsible officers and agents. These considerations are very serious (*International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634), but the view we have taken of the power of the Commission to make the order, however definite and circumscribed it might have been made, renders it unnecessary to pass upon the contentions."

The question, then, is, whether the Section 4 of the Lever Act, in its application to prices, does refer to a standard with any proper definiteness or certainty. Manifestly, the Act itself creates no standard. And, as we have pointed out, the conduct which under the statute as construed below is found to be criminal, was not *prior* to the statute "unjust" or "unreasonable" according to any conception of the law. Before October 22, 1919, when the amended Act was passed, the sale of these articles by the plaintiffs in error at the prices charged would not under the common law, civil or criminal, have raised any question of reasonableness. Then how can it be said that the Act, which simply refers to what is "unjust" or "unreasonable", makes it a criminal offense to do that which before the passage of the Act was not unjust or unreasonable?

This is the obvious distinction between the present case and such a case as that of *Nash* v. *United States*, 229 U. S. 373. That case was a criminal prosecution under the Sherman Anti-Trust Act. But as to this Act the rule of duty had been deduced, as stated in the *Standard Oil case*, "in the light of the common law and the law of this country at the time of its adoption" (221 U. S. p: 49). And the Court there said (*id.* p. 60):

> "Thus not specifying but *indubitably contemplating and requiring a standard*, it follows that it was intended that the standard of reason *which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute*, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided" (italics ours).

Thus it is an entire misconception of the construction of the Sherman Anti-Trust Act to say that it attempted to make criminal, by reference to what was "unjust or unreasonable", conduct which had not been regarded from the standpoint of the law as unjust or unreasonable.

Accordingly this Court in the *Nash case*, speaking through Mr. Justice Holmes, referred to "the common law as to restraint of trade thus taken up by the statute" (229 U. S. p. 377). And Mr. Justice Holmes went on to say that the law was "full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree". He instanced homicide, which might be "'murder, manslaughter or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor", and he also referred to the familiar instance of negligence. But the learned Justice, in this exposition, was dealing with the content of the law, with conceptions familiar to the law and established in the law by "common experience in the circumstances known to the actor". There was no departure from the principle that a criminal statute requires a standard, and a standard that may be known in advance.

The distinction is that in the present case *there is no standard whatever*. Under Section 4 of the Lever Act, as construed by the Court below, there is no common law taken up by the statute. There is no instance in the common law to which the statute refers. There is no legal conception of reasonableness which the statute invokes. When one is dealing with questions of care, or diligence or the various instances to which the Court refers in the *Nash* case in illustrating the significance

of matters of degree, the Court is dealing with standards which have been erected in the experience of mankind which have received such certainty of definition in the common judgment as to be admitted to the body of the common law and, thus recognized by the Court, under limitations of judicial instruction, are committed to juries for the purpose of enforcement.

This familiar principle, which gives reasonable scope to legislation, by denying the necessity of adherence to any artificial formula, has not the slightest application where the acts concerned have not previously been viewed as unjust, or unreasonable, or wrong, or illegal, according to any concept of the law, and the Legislature has not attempted to supply a definition in order to supplement the common law. Here, there is no category of the law which affords any guide by which the citizen may govern his conduct. It is left to the jury both to define and convict. The crime with respect to the price of an article sold in trade, as the statute is construed by the Court below, is essentially a new thing; it is without ancestry in the law and has no legal relations which aid any attempt at definition.

The opinion in the *Nash case* refers to the case of *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 109. But the latter case distinctly recognized the principle laid down in *Tozer* v. *United States*, *supra*, and *Railway Co.* v. *Dey*, *supra*, and *Louisville & Nashville Railway Co.* v. *Commonwealth*, *supra*, and held that the Texas statutes in question in the *Waters-Pierce case* did "*not* give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or un-

reasonable, as do the statutes condemned in the cases cited."

In the *Waters-Pierce* case, the question arose under an anti-monopoly statute which prohibited acts which were "reasonably calculated" and "tended" to accomplish the prohibited result. But in that case the result lay within the familiar field of the law with respect to monopoly and restraint of trade, and the words "reasonably calculated" and "tended" did no more than apply the common law of *"attempts."* As the Court said: "It is not uncommon in criminal law to punish not only a completed act, but also acts which attempt to bring about the prohibited result." And the Court examined the cases which discussed what is essential to constitute in law an "attempt." The Court thus construed the statute as coming within one of the categories of the law and not as lying without them.

In *Fox* v. *State of Washington,* 235 U. S. 273, the statute denounced willful printing, circulation, etc., or matter advocating or encouraging the commission of any crime or breach of the peace. The statute was found to be referable to legal standards, for the Court held (p. 277) that it laid hold of "encouragements that, apart from statutes, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or principal in the crime encouraged." The sort of conduct which encourages crime in the sense that it *aids* or *abets* the perpetration of crime so as to make one an accomplice or a principal, is well known. And the statute as construed fell within a familiar category of the law.

In *Miller* v. *Strahl,* 239 U. S. 426, the statute related to the conduct of innkeepers with respect

to the protection of guests in case of fire. The statute particularized what should be done with respect to the employment of watchmen, the use of fire alarm gongs, etc., and added that it should be the duty of the innkeeper "to do all in his power" to save his guests. The opinion shows that the words in question were read in the light of their context as describing the degree of care required in taking available precautions.

In *Omaechevarria* v. *Idaho,* 246 U. S. 343, the law of Idaho prohibited a person owning sheep from allowing them to graze on a range "usually occupied by any cattle grower either as a spring, summer or winter range for his cattle." Objection was taken to the statute because of the reference to the prior occupation as a "usual" one. But this reference to what was customary did not go beyond the bounds of a permissible generalization and referred to a standard well understood by everyone familiar with the cattle ranges.

SIXTH.—The statute in question is arbitrary class legislation in violation of the Federal Constitution.

Section 4 of the Lever Act as amended by the Act of October 22, 1919, contains these provisos:

> "*Provided,* That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: *Provided further,* That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any co-operative as-

sociation or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them."

In other words, producers of coal, manufacturers and dealers in farm machinery and equipment, manufacturers and dealers in mining machinery, refiners of sugar, dealers in food products, all those who are engaged in industry and trade (outside the favored class) who have to do with the production, manufacture or distribution of the described commodities are compelled to conduct their activities on pain of criminal prosecution if they make an "unjust" or "unreasonable" rate or charge "in handling or dealing in or with any necessaries," but farmers, gardeners, ranchmen, dairymen and stockmen or other agriculturists with respect to their farm products may make "unjust" and "unreasonable" rates and charges with impunity.

The Lever Act was originally passed as a war measure in relation to the food and fuel supply. The amendment of October 22, 1919, continued the Act as to food, feeds and fuel, and added wearing apparel. It had been asserted in the first section of the Act, as enacted in August, 1917, that the Act was passed by reason of the existence of a state of war, and as being essential to the national security and defense and for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to the end that an adequate supply and equitable distribution of food and fuel should be assured. It was for these purposes that the instrumentalities, means, methods and powers and prohibitions were

established, conferred and prescribed (Sec. 1).

If regard be had to these broad purposes, there can be no possible reason for excepting any class of citizens from application of the statute with respect to the commodities described.

The Government, in its effort to support the exception of favored classes, raises the question whether the provision of Section 4, as to making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" applies to producers (Govt. brief in *Tedrow* v. *Lewis*, No. 357 of this Term, p. 21). The Department of Justice, which is now driven to this contention in the effort to sustain the Act, has heretofore, as we happen to know, been prosecuting with the utmost vigor, not only manufacturers, but even those who are not manufacturers of the described commodities. Thus, the Government has endeavored to stretch the statute to cover manufacturers who do not make or deal at all in wearing apparel and lie outside the Act (*United States* v. *American Woolen Co.*, 265 Fed. 404).

It will be observed that in Section 5 of the Lever Act, relating to the licensing of "importation, manufacture, storage, mining or distribution" of the described necessaries, there was a proviso excepting farmers, gardeners, etc. The Government refers to this section in its brief in the *Cohen Grocery* case (No. 324 of this Term, pp. 3-6). Apart from this, Section 4 of the Lever Act (the Section in question) makes it a criminal offense for "any person" to make "any unjust or unreasonable rate or charge" in handling or dealing in or with any of the described necessaries, and it makes it a criminal offense for any person to conspire or combine with any other person

"(a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing or dealing in any necessaries;

"(b) to restrict the supply of any necessaries;

"(c) to restrict distribution of any necessaries;

"(d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or

"(e) to exact excessive prices for any necessaries."

The proviso follows that this shall not apply "to any farmer, gardener, horticulturist * * * or other agriculturist, with respect to the farm products produced or raised upon land owned, leased or cultivated by him." Thus, according to the terms of this Act, which was passed originally to protect the food supply, *farmers, gardeners, etc., are permitted, so far as this statute is concerned, to conspire, combine, agree or arrange to limit facilities, restrict supplies, restrict distribution, prevent, limit or lessen production, and exact excessive prices.* They are excepted from the provisions applying to other persons who conspire for such purposes.

Section 4, as amended, which contains this discrimination in favor of farmers, etc., comes directly within the ruling of this Court in

Connolly v. *Union Sewer Pipe Company*, 184 U. S. 540.

There the Court was dealing with the Anti-Trust Act of Illinois, condemning trusts or combinations or conspiracies to limit production, prevent competition and fix prices. The Act contained this proviso (*id.* p. 554):

"Sec. 9. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

And because it contained this utterly indefensible attempt to subject certain portions of the community to restrictions from which the favored class was to be free, the Court held the statute to be unconstitutional and void. The Court said (*id.* pp. 563-564):

"Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that *if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty.* Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the gen-

eral public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary." (Italics ours).

It is familiar learning that the legislature has a broad power of discretion in classification and the books are full of cases illustrating this principle, especially in upholding the exercise of the police power of the States and establishing their freedom to adjust their remedies to the evils they seek to reach. But however broadly this power of classification be conceived, it has a *limit*. There is still such a thing as arbitrary class legislation, utterly indefensible and peculiarly obnoxious to our institutions. Where classifications have been sustained, this result has been reached because they could not properly be denounced as arbitrary; for arbitrary classification, which puts one citizen under penalty and gives another under the

same conditions immunity without reason, there is no room in our system of government.

However infrequent may be the instances of legislation deserving this condemnation, we have here one of these instances, for it falls directly within the ruling in the *Connolly* case. The language of the proviso in Section 4 of the Lever Act is somewhat amplified, but the provision in substance is identical with that which, in the *Connolly* case, was explicitly condemned. We submit that there is no possible distinction.

Section 4 provides that the section shall not apply to farmers, etc.,

> *"with respect to the farm products produced or raised upon land owned, leased, or cultivated by him."*

The provision in the Illinois statute in the *Connolly* case was that the provision of the Act should not apply to

> *"agricultural products or live stock while in the hands of the producer or raiser."*

Further, it cannot be said that the decisions subsequent to the *Connolly* case with respect to the broad power of classification have in any way impaired its authority. For in the case of *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 215, the Court explicitly said:

> "It is said that the statute as construed by the Supreme Court of the State comes within our ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, but we do not think so. *If it did we should, of course, apply that ruling here.*" (Italics ours.)

See, also,

McFarland v. *American Sugar Refining Co.*, 241 U. S. 79, 86.

Probably no two cases could be found more exactly the same, with respect to the present point, than the case at bar and the *Connolly* case. But if any distinction could be made, it would not avail to support the present statute, which presents even a stronger case. In the *Connolly* case, the Court was dealing with an anti-trust act and it could not conceive of any possible ground on which those engaged in selling dry-goods or groceries, or meats, or fuel, or clothing, should, under the statute, be made criminals for combining for the prohibited purposes, while their neighbors who happened to be agriculturists and live stock raisers were left immune. If that was not a case of invalid class legislation, the Court evidently thought there could not be such a case. Here, the fact that the country was at war emphasizes the indefensible and arbitrary character of the proviso. In its first section, the present statute sets forth that it is designed, in order to provide for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution and to facilitate the movement of foods, feeds, etc. Food products are included in the purpose stated, and, manifestly, protection against unreasonable prices of farm products was just as important as protection from unreasonable prices of coal and sugar and groceries or farm machinery. Of what avail would it be to prevent unreasonable prices by butchers and grocers if farmers and live stock raisers were free to charge unreasonable prices?

It has been suggested by the Government in other cases that possibly Congress desired to encourage production by farmers. But it was just as important that there should be production of coal and of sugar, and that industry with respect to all the described necessaries should produce at the maximum. Food could win the war, but it could not win it without fuel, or without the numberless other things which come within the description of articles embraced in the Act. The argument for the encouragement of production by farmers and live stock raisers was just as pertinent, and just as specious and lacking in merit, in the *Cossolly* case. Indeed, there is not a single thing that can be said in favor of the proviso in the present statute which could not have been urged for the proviso in the statute under consideration in the *Cossolly* case. But in that case the Court struck to the heart of the matter when it denounced the proviso for what it *was* and condemned the statute as a pernicious piece of class legislation arbitrarily distinguishing between citizens with respect to the conduct of their business. There has been unquestionably an increasing tendency towards class legislation and the field of legislative discretion is so wide that the Courts are rarely permitted to see what everybody else knows. When, however, a case is presented directly within the decisions—a bald case of arbitrary class legislation putting a penalty upon some and affording others immunity without reason in view of the nature and purpose of the statute—we submit that this perversion of power should receive the condemnation it deserves.

The only distinction that could possibly be made, as we conceive it, for the purpose of taking this

case out of the doctrine of the *Connolly* case, would be, not upon the ground that the proviso was not wholly arbitrary, but that in the *Connolly* case the Court was dealing with the clause of the Fourteenth Amendment as to the "equal protection of the law."

It cannot be maintained, however, that Congress has constitutional authority to enact arbitrary class legislation. Our Constitution opens no such avenue to the exercise of arbitrary power. Granted that Congress has as broad a discretion in classification as have the States, there are still limits, and the *due process* clause of the Fifth Amendment is just as sure a protection to the people against arbitrary class legislation by Congress as the Fourteenth Amendment is with respect to similar action by the States.

This is apparent from the definition of due process in the decisions of the Supreme Court. In *Caldwell* v. *Texas*, 137 U. S. 692, 697, the Court said:

> "Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent Comm. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244."

In *Giozza* v. *Tiernan*, 148 U. S., 657, 662, it was said:

> "And due process of law within the meaning of the amendment is secured if the laws

operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. *Leeper v. Texas*, 139 U. S. 462."

And the view that legislation having an arbitrary classification is not due process is recognized by text-writers of the greatest weight. It is said in McGehee on *"Due Process of Law"*, p. 60:

> "Under the American theory of constitutional government, in which constitutions are a restraint even on the legislature, the idea has had a more fruitful development. Purely arbitrary decrees or enactments of the legislature directed against individuals or classes are held not to be 'the law of the land,' or to conform to 'due process of law.' The conception comes clearly to the front in Mr. Webster's definition of 'law of the land,' which has been already quoted, and it has been frequently repeated by the courts. 'Due process of law within the meaning of the (Fourteenth) Amendment,' said the Federal Supreme Court, 'is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' 'By the law of the land,' said the Michigan court, 'We understand laws that are general in their operation, and that affect the rights of all alike, and not a special act of the legislature, passed to affect the rights of an individual against his will and in a way in which the same rights of other persons are not affected by existing laws. Such an act, unless expressly authorized by the Constitution, or clearly coming within the general scope of legislative power, would be in conflict with this part of the Constitution, and for that reason, if no other, be void.' 'The clause 'law of the land,'' said Mr. Justice Catron, when a member of the Supreme Court

> of Tennessee, 'means a general and public law, equally binding upon every member of the community.' In a later case, the same court, in order to bring out the constitutionality of legislative classification, preferred to define the phrase as meaning a law 'which embraces all persons who are or may come into like situation and circumstances.' "

Professor Willoughby, in his important work on the Constitution, pp. 873-874, says:

> "The United States is not by the constitution expressly forbidden to deny to anyone the equal protection of the laws, as are the States by the first section of the Fourteenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the States, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws 'operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

This question, however, is not left to general definitions or the statement of text writers. It has recently received authoritative exposition by the Supreme Court in *Bruskaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1. There, the validity of the Income Tax Act of 1913 was assailed upon the ground that it contained illegal discriminations.

The effort was unsuccessful and the Court found that the statute was within the broad power of Congress in deciding upon the subject and manner of taxation. It was recognized that the Constitution did not conflict with itself by conferring the taxing power on the one hand and virtually withdrawing it through the due process clause on the other hand. But while this was clearly determined, the opinion of the Court defined its attitude with respect to the power of Congress and *pointed out the limitations with respect to classifications that are found in the due process clause of the Fifth Amendment.* After referring to this clause and the fact that it did not operate to invalidate the act under consideration, the Court said (*id.* pp. 24, 25):

> "And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, *the act complained of was so arbitrary* as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, *or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.*" (Italics ours.)

There is, therefore, no room for the argument, that what the Supreme Court condemned in the Illinois statute, in the *Connolly* case, because it produced "a gross and patent inequality" obnoxious to the principles of our institutions, can be sustained in an act of Congress.

Upon this ground Section 4 has been held invalid in a careful opinion by District Judge Anderson in

United States v. *Armstrong*, 265 Fed. 683.

In supporting the contrary view, set forth in *C. A. Weed & Company* v. *Lockwood* in the Circuit Court of Appeals for the Second Circuit (not yet reported), Judge Hough says:

> "If we were in a state of 'official' peace, this statute would in my judgment be unconstitutional under *International Harvester Co.* vs. *Kentucky*, 234 U. S. 216; the condemnation there expressed (especially p. 223) is applicable here word for word. It would also be constitutionally obnoxious because it is a gross piece of class legislation;—incapable of distinction from that condemned in *Connolly* vs. *Union, etc. Co.*, 184 U. S. 540.
>
> "But the statute is begotten by war, and is constitutionally excused (*i. e.* justified) by the war power, which is superior to, and not to be measured by, the police powers of the several states."

We submit that the doctrine of this statement cannot be supported. It recognizes an authority in Congress, to destroy all property rights by penal legislation without reference to any standard the citizen can know and by the most arbitrary discriminations. The broadest conception of the war power involves no such necessity. Congress can regulate without destroying; it can penalize in accordance with some proper standard that its citizens can know; it can avoid an utterly vicious and indefensible discrimination whose only effect can be to bring about confusion and impair the essential stability of the country. Neither in

war nor in peace, can Congress disregard the fundamental requisites of valid legislation by purely arbitrary exactions and limitations which have no reasonable relation to any proper object.

Ex parte Milligan, supra;
Hamilton v. *Kentucky Distilleries Co., supra.*

We submit that there is not the slightest excuse or basis for a proviso of this character, and upon this ground the statute should be held invalid.

SEVENTH.—The Court below erred in its rulings upon questions of evidence.

For reasons already stated, the Court below was in error in refusing to receive evidence of the market value of the articles in question, both at the time of the enactment of the Amendment of October 22, 1919, and at the time the articles were marked for sale, and at the time of the sales described in the indictment.

Assignment of Errors Ninth and Tenth, Transcript, pp. 148-153.

And taking the theory on which the case was tried, the Court erred in excluding the evidence of the actual cost of various articles which went into "transfer lots" and which were brought together and given an average cost price.

Assignment of Errors, Thirteenth, *id.*, pp. 157-158.

The Court also erred in rejecting testimony bearing upon the selling price of hats.

Assignment of Errors Eighth, *id.*, pp. 147-148.

The Court erred in excluding evidence relating to net profits, good faith, and the good reputation of Weed's, Inc.

Assignment of Errors, Eleventh, Twelfth and Fourteenth, *id.*, pp. 153-157, 158.

EIGHTH.—The Court below erred in its charge to the jury.

Assignment of Errors, Sixteenth, *id.*, pp 159-160.

The full charge appears in the transcript (*id.*, pp. 119-125). The theory upon which the Court submitted the case to the jury has already been fully considered in the points we have discussed.

The Court also erred in permitting the Assistant United States Attorney to make an inflammatory appeal to the jury, and in the Court's interruption of counsel for the plaintiffs in error as he was summing up.

Assignment of Errors, Seventeenth and Eighteenth, *id.*, p. 160.

Upon the grounds which have been argued, it is also submitted that the demurrer to the indictment

should have been sustained, or the motion to dismiss or to quash allowed, or that the motion in arrest of judgment should have been granted.

The judgment of the District Court should be reversed and the indictment dismissed.

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